JOHORE REPORTS.

[ORIGINAL CIVIL JURISDICTION]

LAVILLE, J.

December 30, 1939.

HO KAI NEO (widow) and CHEW SWEE YAN vs. TAN KIM TEE and TAN KIEM TIE LIMITED.

[JOHORE BAHRU CIVIL SUIT No. 26 of 1939]

Practice—Security for Costs—Plaintiff out of Jurisdiction—Discretion of Court—How to be exercised —F.M.S. Civil Procedure Code, Section 369 (i).

The rule that security for costs should be given by a plaintiff who ordinarily resides outside the jurisdiction of the Court in which the action is brought, and who owns no property in the territory within its jurisdiction, is not an inflexible rule. The power to order security is a discretionary power which must be exercised according to the circumstances of the case. The fact that the Courts of the country in which the plaintiff resides will enforce a judgment of the Court in which the plaintiff sues may be a sufficient ground for refusing an order for security. Nor is the fact that the plaintiff owns no property in any way conclusive. Poverty, by itself, is no ground for an order unless the plaintiff is only a nominal plaintiff or a mere puppet suing on behalf of another.

Raman Chettiar v. Palaniappa Chettiar & Another(6) and **Coldham v. The Raub Australian Gold Mining Co., Ltd.**(2) followed.

Cases referred to:—

(1) *Brogden v. Crozat,* (1894) 2 Q.B. 30.

(2) *Coldham v. Raub Australian Gold Mining Co., Ltd.,* 9 M.L.J. 50.

(3) *In the Goods of Premchand Moonshee,* I.L.R. 21 Calc. 832.

(4) *In re Pretoria Pietersburg Railway Co.,* (1904) 2 Ch. 359.

(5) *Raeburn v. Andrews,* 9 Q.B.C. 118.

(6) *Raman Chettiar v. Palaniappa Chettiar, & Another,* 8 M.L.J. 165.

(7) *Wakely v. The Triumph Cycle Co.,* (1924) 1 K.B. 214.

SUMMONS-IN-CHAMBERS.

The facts and arguments sufficiently appear from the Judgment below.

Mallal for plaintiffs.

Koek for defendants.

Cur. Adv. Vult.

Laville, J.—In this summons the defendants apply that plaintiff should give security for costs in this suit in the sum of $1,500/- on the ground that the plaintiff is ordinarily resident out of the State.

The suit is by the widow and a son as executor and beneficiary against the creditor—administrator of her husband's estate in Johore for breach of trust.

It is conceded by plaintiff that she resides out of the jurisdiction and is a woman of no substance and that she cannot find even $750/- security but it is argued by her counsel that the usual rule that a plaintiff who resides out of the jurisdiction should put up security for defendants' costs does not apply in this particular instance.

He bases his argument on the wording of Section 369 (i) of the Civil Procedure Code F.M.S. which makes the order to put up security one for the discretion of the Court and quotes a written judgment by Poyser C.J., F.M.S. in Raub Civil Suit No. 12 of 1938* which has not yet been published in which the question was argued as to whether the discretion allowed by the Civil Procedure Code was an unfettered one or had been limited by the practice of the Courts.

In that suit it was argued for the defendants the *Raub Australian Gold Mining Co., Ltd.* that the general rule was that a plaintiff residing out of the jurisdiction with no immoveable property therein must give security for costs to defendant. (The F.M.S. and Johore Civil Procedure Codes are one and the same enactment and what applies to one also applies to the other). The short point was that the word "may" had been converted by the practice of the Courts into the word "must". Counsel for defendants contended that in England though the Court had a discretion in practice this discretion was only exercised in one way, *i.e.,* to make the order. Annual Practice 1939 p. 1438 was quoted where in relation to O. 65, r. 6 it is stated:—

> "The ordinary ground on which security is granted is residence abroad and subject to exceptions the rule is inflexible.....Where the plaintiff resides in Scotland or in Northern Ireland security for costs will not be required of him, for by the combined effect of the Judgments Extension Act 1868 and the Judicature Act 1873 Section 76 a judgment in any Division of the High Court was enforceable in Scotland or Ireland, but now by the operation of the Government of Ireland Act 1920 Southern Ireland is within the rule which requires security."

Cases relied on in support of the above were *In Re Pretoria Pietersburg Railway Co.,*(4) where Buckley J. declared "It is well settled that, as a general rule, if a

*[Since reported in 9 M.L.J. 50 — Ed.]

person resident abroad is....a plaintiff....and has not assets within the jurisdiction which can be reached, he may, except in special circumstances be ordered to give security."

Brogden v. Crozat[1] was also quoted in support of the general rule, though Lord Esher M.R. doubted its complete inflexibility.

Counsel for plaintiff a Mr. Coldham opposed an order for security on the ground that such order was wrong in law and secondly that the Court's discretion was an active one and not bound by anything but the circumstances of each case and that in this case the delay of the defendants in asking for the order and the general circumstances of the case favoured the plaintiff's contention. On the 1st. ground *Raeburn v. Andrews*[5] was quoted where no order was made on the score that the reason for such an order was the residence of the plaintiff abroad out of reach of the process of the Courts, and that since that handicap had been overcome in regard to Scotland by the Judgments Extension Act 1868 the reason for the rule had gone.

On the 2nd. ground reliance was placed on order XXV Indian Civil Procedure Code which is similar to Section 369 of our Civil Procedure Code, and cases cited thereunder showing that the exercise of the Court's discretion as to making an order that a non-resident plaintiff should give security for costs is not so fettered as it appears to be by the English practice; and in *Re Raman Chettiar v. Palaniappa Chettiar & another*[6] Aitken J. following *In the Goods of Premchand Moonshee*[3] held that the powers given under Section 369 are discretionary and the Court ought or ought not to exercise them according to the circumstances of each case.

On the above submissions Poyser C.J., F.M.S. decided to follow Aitken J. and held that the Court has an unfettered discretion in the matter in each case and refused to make the order for security for costs on the ground that under the Reciprocal Enforcement of Judgments Enactment there is no difficulty in enforcing Colony a judgment of the F.M.S. Courts and that there had been undue delay by the defendants in making their application.

In the matter before me I consider that I should follow the ruling in *Raman Chettiar v. Palaniappa Chettiar & another*[6] and in *J. C. Coldham v. The Raub Australian Gold Mining Co., Ltd.*[2] that the discretion of the Court as to whether the order should be made or not is to be exercised according to the circumstances of each particular case.

The defendants in their affidavit supporting this summons give as one of the reasons for demanding security for costs the fact of non-residence in the State.

The case of *Raeburn v. Andrews*[5] together with *Wakely v. The Triumph Cycle Co., Ltd.*[7] makes it clear that where the Courts of the country in which the plaintiff resides will enforce and have easy and convenient means of enforcing the judgments of the foreign Court in which the plaintiff sues, even the inflexibility of the English rule is relaxed and a non-resident plaintiff with no assests in the country of trial will not necessarily be called on for security. The connection between the Johore Courts and the Colony Courts is close and the means of enforcing the judgments of the superior Courts of either in the territory of the other ample and convenient. On this ground therefore there is no reason why the plaintiffs should be called on to give security for costs.

The other reason advanced by the defendants is that the plaintiffs have no property within the State of Johore and in fact have no property at all. This is admitted by the plaintiffs, and the question is therefore raised as to whether a plaintiff who is not a pauper so as to entitle him to sue as such and is yet not in a position to put up security for the costs of the defence in case of failure should be debarred from prosecuting his claim thereby.

It is clear that to accept such a ground would be a denial of justice. The proper view point appears to be that poverty in itself on the part of the plaintiff is no ground for such an order unless the plaintiff is a puppet suing on behalf of another or is a nominal plaintiff. *Sarkar's* Indian Civil Procedure Code VIIIth. Ed. Vol. 2 p. 1937. The true criterion appears to be (1) is the suit instituted *bona fide* (2) has the plaintiff a substantial interest in it. Even if the plaintiff is a woman the Court will not ordinarily in such circumstances order security for costs. There would have to be some indication that the defence was more likely to be true than the claim before the Court would on the ground of poverty rob the plaintiff of the right to his suit.

In the suit under consideration the plaintiffs are a woman as executrix of the will of her husband and his son as a beneficiary suing a creditor-administrator in Johore for breach of trust in regard to her husband's Johore Estate. There can be no doubt both plaintiffs have a substantial interest and there is no reason to suspect the *bona fides* of the claim. Defendants have entered appearance but filed no defence. It is therefore

impossible for me to say that there is any indication that it is more likely to be true than the claim.

Adopting the view of the law set out above I consider that no grounds have been made out for calling on the plaintiffs to put up security for the costs of the defendants and I therefore dismiss the application. Costs of the application will be costs in the cause.

Application dismissed.

[APPELLATE CIVIL JURISDICTION]

LAVILLE, J.

December 14, 1939.

TEO TONG v. TAN SAI HOON.

[JOHORE BAHRU ORIGINATING MOTION No. 1 of 1939]

Practice—Pauper Appeals—Enlargement of time—F.M.S. Civil Procedure Code, Chapter XLVI.

A litigant who desires to appeal in **forma pauperis** to the Court of Appeal after the time for appeal has expired must—before applying for an enlargement of time—satisfy the Registrar of the Court of Appeal both as to his pauperism and as to the merits of his intended appeal, and for such purpose must attach to his application for leave to appeal as a pauper a memorandum of appeal, as if the application were made under Chapter XLVI of the F.M.S. Civil Procedure Code.

Case referred to:—

(1) *In re Brook David deceased,* 6 M.L.J. 231.

MOTION before a single Judge of the Court of Appeal.

The facts and the points of procedure in question appear from the judgment below.

Applicant in person.

Chia for Respondent.

Laville, J.—The circumstances leading up to this application are as follows:—

In Kluang Civil Suit No. 1 of 1937 the present applicant was defendant: his case was set out by counsel, Mr. Mitter and judgment was entered against him in October, 1937.

Against this judgment he entered notice of appeal after seeking advice of counsel, Mr. Fung on 25th October, 1937, but before the appeal was heard on advice of his counsel, Mr. Fung who also acted for him in the appeal instituted certain proceedings by Originating Summons No. 105 of 1937. The appeal was dismissed without trial, the present applicant withdrawing it by signed notice to that effect and Mr. Fung notifying the Court and the proceedings in Originating Summons No. 105 of 1937 were also dropped and the summons dismissed on 30.4.38.

In spite of withdrawing his appeal and O.S. present applicant appears to have been dissatisfied with the judgment of the Court in C.S. Kluang No. 1 of 1937 and after petitions to the Judge, Johore who rejected his petition after enquiry and petitions to the Chief Justice, Straits Settlements which were referred to this Court he applied to be allowed to appeal in *forma pauperis* against the decision in Kluang Civil Suit No. 1 of 1937.

By Section 32 Courts Enactment the provisions of the Civil Procedure Code relating to appeals by paupers apply, as nearly as possible, to appeals by paupers to the Court of Appeal. This provision by virtue of Chapter XLVI of the Civil Procedure Code appears to nullify the effect of Section 529 (1) of the Civil Procedure Code which states that the provisions of Chapter XLV of that Code do not affect the procedure in appeals from the Court of a Judge to the Court of Appeal.

Under the combined provisions of Sections 569 and 532 Civil Procedure Code as applied to the Court of Appeal by virtue of Section 32 Courts Enactment a pauper desirous of appealing must file with his application to appeal *in forma pauperis* a memorandum of appeal, complying with the provisions of Chapter XLV of the Civil Procedure Code. The Court of Appeal will then examine the application and applicant through the Registrar to whom by Order 1 Rule 40 (1) (g) their authority is delegated, on the *prima facie* merits and pauperism as made necessary by Section 596 read with Sections 436 to 438 of the Civil Procedure Code, and if necessary will send it for opinion of counsel under Section 34 Advocates and Solicitors Enactment and, according as he finds, the Registrar will give leave to bring an appeal *in forma pauperis* or not.

In my view this order merely removes from the appellant his disability of poverty and enables him to prosecute the matter without fees. His right to appeal has never been lost. There remains for him, if he is in time, to lodge notice of appeal, and then proceed as laid down in the rule, governing appeals to the Court of Appeal. If he is out of time, it is open to him to move the Court, before he lodges notice of appeal, to enlarge the time for doing so.